

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ES & C ASSOCIATES	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, ES & C Associates, 919 Third Avenue, New York, New York 10022, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804300).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 17, 1988 at 1:15 P.M. Petitioner appeared by Shanholt, Marinoff, Eleiss & Co., C.P.A.'s (Alan Hoffman, C.P.A.). The Audit Division appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether penalty asserted pursuant to Tax Law § 1446.2(a) based upon petitioner's failure to timely remit tax due under Tax Law Article 31-B ("gains tax") should be abated.

FINDINGS OF FACT

1. Petitioner, ES & C Associates, is a limited partnership, the general partner in which partnership is R. H. Shapiro and Co. One among the limited partners in this partnership is East Hills Funding Company, Inc. ("East Hills").

2. On December 3, 1984, petitioner transferred certain premises located at 683-685 Ninth Avenue, New York, New York, which transfer resulted in a gains tax liability of \$25,500.00. On December 31, 1984, petitioner transferred certain premises located at 855-857 Ninth Avenue, New York, New York, which transfer generated a gains tax liability in the amount of \$31,500.00. Neither the existence of these gains tax liabilities nor the dollar amounts thereof are in dispute.

3. At or about the time of the above transfers, petitioner filed Transferor and Transferee Questionnaires (Forms TP-580 and 581) and Supplemental Returns (Forms TP-583) with respect thereto. Via the filing of the noted Supplemental Returns, petitioner indicated its request for installment payment treatment (Tax Law § 1442) on each of the noted transfers. Said Supplemental Returns reflected the assertion that petitioner had received no cash consideration at the time of the transfers. It should also be noted that no tax had been paid at the time of either transfer.

4. In response to petitioner's request for installment payment treatment, the Audit Division issued letters requesting substantiation as to certain aspects of the transfers. More specifically, on March 29 and May 6, 1985, the Audit Division requested substantiation with respect to the 855-857 Ninth Avenue transfer. On May 8, 1985, the Audit Division requested substantiation with respect to the 683-685 Ninth Avenue transfer.

5. On September 2, 1986, the Audit Division again requested substantiation with respect to the two transfers. This second request was made due to petitioner's failure to have responded to the prior-noted requests. Petitioner failed to respond to this second request for substantiation.

6. In each letter from the Audit Division, the substantiation documents sought included copies of the purchase money mortgages, a statement of the due date of the mortgages, and/or proposed lease agreements.

7. On September 24, 1986, in response to and as a result of petitioner's failure to supply information as requested, the Audit Division issued to petitioner two notices of determination of tax due under Tax Law Article 31-B. These notices assessed tax due plus penalty (Tax Law § 1446.2[a]) and interest on each of the transfers in question. The Audit Division grounded its imposition of penalty on a number of factors including: (a) the assertion that the supplemental returns as filed were incomplete; (b) that petitioner had not made timely installment payments; and (c) that petitioner had not furnished information, as sought by the Audit Division, in support of its requests for installment payment treatment.

8. Review of contracts relative to the transfers in question reveals that petitioner received cash consideration at or before the time of each closing. This evidence contradicts the position reported by petitioner in the filing of its supplemental returns. At hearing the Audit Division indicated that no payments on the subject liabilities had been made until nearly the second anniversary date of the closings, and then only after the notices in question had been issued.

9. As noted, one of the limited partners in petitioner was East Hills. East Hills has made payment of some of the tax due and, at hearing, indicated that full payment of the tax, plus interest, would be made.¹ More specifically, it was conceded that tax and interest were not in question and would be paid (by the limited partner, East Hills). However, the penalties imposed are challenged and abatement thereof is sought.

10. The only assertion advanced with respect to this request for abatement was that the payments made to date had been made in good faith and by East Hills. The position advanced is that East Hills, as a limited partner, had no knowledge of the fact that the gains tax had not been timely paid, or that there had been a failure of the partnership to respond to the Audit Division's requests for substantiation regarding installment payment treatment. In essence, East Hills claims a complete lack of knowledge of any errors, and seeks abatement of penalties based upon the assertion that it is essentially an innocent party which will in fact be paying any amounts held

¹The amounts of the first and second installment payments (as such would be calculated assuming installment payment treatment was available to petitioner) were paid on or about the second anniversary date of each of the transfers.

due, including any penalty amounts.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which was effective March 28, 1983, imposes a tax at the rate of 10 percent upon gains derived from the transfer of real property within New York State.

B. Tax Law § 1442 provides, in part, that "[t]he tax imposed by [Article 31-B] shall be paid by the transferor...on the date of transfer." Said section further provides that a transferor may elect to pay the tax on an installment basis as follows:

"...if the tax due exceeds fifty percent of the cash portion of the consideration received by the transferor on or before the date of transfer, the transferor may elect (i) to pay the entire tax, or (ii) where the cash portion of the consideration exceeds the tax due, to pay fifty percent of such cash portion, or (iii) where the cash portion of the consideration is equal to or less than the tax due, to pay the lesser of (a) fifty percent of the tax due or (b) such cash portion...."

Section 1442 thereafter details the manner in which installment payments on the balance of the liability are to be made under each of the situations described above.

C. In addition to the foregoing, Tax Law § 1442 provides, in part, as follows:

"If the transferor shall fail to pay any such installment on the date on which it is due, the [commissioner of taxation and finance] may declare the entire unpaid balance of the tax due and owing."

D. In this case, there is no question that the transfers were subject to the tax, nor any question as to the amounts of tax due or the dates of the transfers. Tax Law § 1446.2(a) provides for the imposition of a penalty at the rate of 10 percent, plus interest thereon at the rate of 2 percent per month up to a maximum of 25 percent interest, in instances where gains tax due is either unpaid, or is late paid, or where filings of returns due are not timely made. There is no evidence to countermand the assertions by the Audit Division that no tax was paid at the time of the transfers or that requested substantiation supporting the claim for installment payment treatment was never submitted. The evidence submitted reflects that the Supplemental Returns seeking installment payment treatment were incomplete as filed. Further, under the terms of the contracts of sale and contrary to petitioner's assertions, cash consideration was received on or before the dates of the transfers. In comparison to the amounts of tax concededly due, this receipt of cash consideration renders petitioner's failure to pay the tax due on the dates of transfer erroneous per Tax Law § 1442. These failures, in turn, allow the Audit Division to deny the requests for installment payment treatment, to declare the entire tax to be due on the dates of the transfers, and to impose penalty based on petitioner's failure to have timely remitted such tax.

E. Petitioner's only request is for abatement of penalty, and the only basis upon which such request is grounded is an alleged lack of knowledge on the part of one of petitioner's limited partners as to any errors by the partnership in dealing with the gains tax as it applied to the transfers in question. Such assertion without more does not explain or excuse the conduct giving rise to the imposition of penalties, as described, nor does it warrant abatement of such penalties

herein properly imposed by the Audit Division.²

F. The petition of ES & C Associates is hereby denied and the notices of determination of tax due under Tax Law Article 31-B dated September 24, 1986 are sustained.

DATED: Albany, New York
December 22, 1988

/s/ Dennis M.

Galliher _____
ADMINISTRATIVE LAW JUDGE

²The argument advanced for abatement (i.e., failures by the partnership) to some degree places petitioner's general partner, and East Hills, one of petitioner's limited partners, at odds. This situation, however, is of no moment in this proceeding. The amounts in question are properly due and owing and any action for recourse by East Hills against other parties does not lie in this forum.